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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

TERRI JO NEFF, a single woman, Plaintiff, v. COCHISE COUNTY; COCHISE COUNTY BOARD OF SUPERVISORS; ARLETHE RIOS, COCHISE COUNTY CLERK, Defendants.	**Case No. CV201900323** **DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S STATUTORY SPECIAL ACTION COMPLAINT** **Assigned to Hon. David Thorn** **Div. III**

Defendants Cochise County, Cochise County Board of Supervisors, and Arlethe Rios, Cochise County Clerk (collectively, "Defendants"), through undersigned counsel, hereby replies to Plaintiff's Response to Defendants' Motion to Dismiss.

MEMORANDUM OF POINTS AND AUTHORITIES

I. THE ENGAGEMENT LETTER IS AN ATTORNEY-CLIENT PRIVILEGED CONFIDENTIAL DOCUMENT

Plaintiff is disingenuous when she alleges that the County simply *assumes* that an engagement letter for legal services is not a confidential attorney-client privileged document. (Plaintiff's Response, p. 4, 4:9-4:12.) There is no assumption here. The engagement letter is a communication between the client (Cochise County) and an attorney (Jim Jellison) for the purpose of obtaining legal services. This falls squarely within the definition of confidential attorney-client communications as defined under A.R.S. § 12-2234.

In fact, California, our nearest neighboring state that has an enormous volume of state case law, does not have any cases that specifically exempt engagement letters from protection of the attorney-client privilege. Why? Because California recognizes the importance of the attorney-client privilege as it applies to engagement letters. California expressly deems that engagement letters are protected by attorney-client privilege. Cal. Bus. & Prof. Code § 6149. Section 6149 provides that:

> "A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code." [1]

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[1] Section 952 of the California Evidence Code makes confidential communications between client and lawyer privileged. Section 6068(e) of the California Business and Professions Code provides that an lawyer must "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Id. As such, an engagement letter is a confidential communication protected by attorney-client privilege. Therefore, Plaintiff's assumption that the engagement letter is not a confidential attorney-client privileged document is a fallacy, as there is evidence that it is privileged from our closest neighboring state.[2]

II. THERE ARE NO ARIZONA CASES DIRECTLY ON POINT FOR THE ISSUE.

The fact remains, and Plaintiff acknowledges (Plaintiff's Response, p.8, 8:7-8:9), that there are ***no*** Arizona cases that directly address the applicability of attorney-client privilege to engagement letters in the context of a public records request. Moreover, the cases that Plaintiff offers in support of her position are inapposite and easily distinguishable from the instant matter.

First, in her Response Plaintiff proffers a litany of federal cases from Ninth and Eighth Circuits. However, none of those cases interpret Arizona state law. The federal cases involve federal questions, not diversity, and specifically interpret federal common law, the Federal Rules of Evidence and federal privilege, which is much different from Arizona state law. *See United States v. Blackman*, 72 F.3d 1418, 1423 (9th Cir. 1995)("The district court correctly noted that 'since the adoption of the Federal Rules of

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[2] In Plaintiff's Response she cites cases from New York and Utah where those Courts held certain aspects of retainer agreements were not subject to attorney-client privilege. However, there is a conflict between these states and states like California that make engagement letters confidential communications protected by attorney-client privilege. There is no evidence to suggest that Arizona would not take the same position on this issue as California. In fact, Arizona's Public Records Law was modeled after California's Public Records Law. (Plaintiff's Response, Exhibit 1, p. 5, ¶ 1 ("Since A.R.S. § 39-121 was adopted from California, California judicial decisions are of assistance in interpreting our statute."). Under California Public Records Law, an engagement letter is a protected communication subject to attorney-client privilege.

Evidence, courts have uniformly held that federal common law of privilege, not state law applies.' *See Sepenuk*, 864 F.Supp. at 1004 n.1; *Clarke*, 974 F.2d at 129 ('Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law')(citing *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989); Fed.R.Evid. 501)."; *see also Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9th Cir. 1992) ("Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law . . . (citations omitted)"). Because federal law is not Arizona state law, the federal cases proffered by Plaintiff in support of her position do not construe or interpret Arizona state law and are inapposite for the issue at hand. Consequently, this Court should not consider these cases in its analysis.

Second, in her Response Plaintiff acknowledges that the Arizona cases that she cited do not directly address the issue at hand. [3] (Plaintiff's Response, p. 4, 4:7-4:10, 4:15-4:17.) Plaintiff then goes on to describe the unrelated matters and quotes *dicta*

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[3] *State Farm Mut. Auto. Ins. Co. v. Lee,* 199 Ariz. 52, 64, 13 P.3d 1169 (2000) is a case about waiver and implied waiver of attorney-client privilege in the context of an insurance bad-faith lawsuit against an insurance company for rejection of uninsured/underinsured motorist claims. *Granger v. Wisner*, 134 Ariz. 377, 379, 656 P.2d 1238 (1982) is a case about whether attorney-client privilege applied to a consulting expert retained by plaintiff, who was later called by defendant to testify in a medical malpractice lawsuit. *Ulibarri v. Superior Court In & For Cty. of Coconino*, 184 Ariz. 382, 909 P.2d 449 (Div. 1 1995) is a case about whether there was a waiver of attorney-client privilege in a medical malpractice case. *KPNX-TV v. Superior Court In & For Cty. of Yuma*, 183 Ariz. 589, 905 P.2d 598 (Ct. App. 1995) is a case about refusal to disclose law enforcement investigatory records based on the "best interest of the state" exception to disclosure of public records - not based on "records made confidential by statute" exception, as is the case here - where the Court used a balancing test and in camera review of the materials. No such balancing test is applied in this situation. None of Plaintiff's cited cases address the records made confidential by statute exception to public records disclosure as it applies to an attorney-client privileged engagement letter.

regarding the applicability of the attorney-client privilege. However, *dicta* is *not* Arizona state law. None of Plaintiff's cited cases stands for the proposition that a confidential attorney-client privileged engagement letter must be disclosed in response to a public records request. Consequently, these cases are inapposite and distinguishable, and this Court should not consider these cases in its analysis.

III. ARIZONA PUBLIC RECORDS LAW EXEMPTS THE DISCLOSURE OF RECORDS MADE CONFIDENTIAL BY STATUTE

It is true that Arizona's Public Records Law provides a broad right of inspection to the public. *Schoenweiss v. Hamner*, 223 Ariz. 169, 172, 221 P.3d 48, 54-55 (Div. 1 2009). However, "[i]t is settled law in Arizona that '[d]espite the unlimited disclosure expressed by the wording of § 39-121, the availability of records for public inspection is not without qualification.' *Carlson*, 141 Ariz. at 490, 687 P.2d at 1245. ***Public records are not available for inspection when they are made confidential by statute***. *Id.*; *Phoenix Newspapers, Inc. v. Keegan*, 201 Ariz. 344, 348-49, ¶¶ 18-19, 35 P.3d 105, 109-10 (App.2001)." *Schoeneweis v. Hamner*, 223 Ariz. 169, 173, 221 P.3d 48, 52 (Div. 1 2009) (emphasis added). The custodian of public records **must** deny inspection when the record is made confidential by statute. *Berry v. State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (Div. 1 1985) (emphasis added).

The only Arizona case that is remotely on point for the issue at hand is *Berry v. State*, 145 Ariz. 12, 13-14, 699 P.2d 387, 388-89 (Div. 1. 1985) ("*Berry*"). In *Berry*, plaintiff (a prisoner) brought an action against the State of Arizona Department of Corrections claiming that he was improperly denied access to his master record file in

violation of Arizona Public Records Law. However, there was a statute, A.R.S. § 31-221, *et seq.* (specifically § 31-221(D)) that clearly prohibited the Department of Corrections from allowing inmates to access their personal master records files and deemed the records files confidential. The appellate court upheld the State's refusal to disclose records, finding that the Public Records Law statute is a general statute that did not apply to the inmate master record files because the specific provisions of A.R.S. § 31-221 made the records confidential. *Id.* at 388. The rule is where two statutes conflict, the specific statute controls over the general statute. *Id.* Therefore, A.R.S. § 31-221 controlled.

Here, similar to the specific, controlling statutes in *Berry* that made inmate records confidential and not subject to disclosure, A.R.S. § 12-2234 is a specific controlling statute that makes attorney-client privileged communications (such as an engagement letter) confidential and not subject to disclosure. Because A.R.S. § 12-2234 makes attorney-client privileged communications confidential. Arizona Public Records Law, A.R.S. §§ 39-101, *et seq.*, specifically, does not require production of a document that has been deemed confidential by statute, rule or a recognized privilege and therefore, the County is not required, under law, to produce the engagement letter.

The bottom line is that the Legislature has made attorney-client communications non-disclosable. A.R.S. § 12-2234. The letter of engagement in this case is an attorney-client communication. Period.

Consequently, Plaintiff's Complaint must be dismissed with prejudice.

IV. CONCLUSION

Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice because Plaintiff fails to state a claim upon which relief can be granted.

RESPECTFULLY SUBMITTED this 11th day of September, 2019.

COCHISE COUNTY ATTORNEY

By: _____
CHRISTINE J. ROBERTS
Civil Deputy County Attorney

Copy of the foregoing mailed
this 11th day of September, 2019, to:

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